	Case 2.05-cv-01770-MJP Document 20 Filed 06/02/06 Page 1 015
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06	UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON
07	AT SEATTLE
08	MICHAEL RAY EVANS,) CASE NO. C05-1770-MJP
09	Petitioner,)
10	v.) REPORT AND RECOMMENDATION
11	SANDRA CARTER,
12	Respondent.)
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14	<u>INTRODUCTION</u>
15	Petitioner is a state prisoner who has filed a petition for a writ of habeas corpus under 28
16	U.S.C. § 2254. Respondent has filed a motion to dismiss, arguing that the petition is untimely and
17	raising other procedural bars to the Court's consideration of the petition. In addition, in response
18	to the Court's request for further briefing, the parties have addressed whether the petition is
19	successive and must be dismissed or transferred to the Ninth Circuit. Based upon a review of the
20	parties' submissions, the Court concludes, for the reasons set forth below, that the petition is
21	successive and should be transferred to the Ninth Circuit pursuant to 28 U.S.C. § 1631 and Circuit
22	Rule 22-3(a).
	REPORT AND RECOMMENDATION PAGE -1

PROCEDURAL HISTORY

Petitioner pled guilty in 1975 in King County Superior Court to one count of first degree robbery. (Doc. #10, Ex. 1). Under the sentencing scheme then in effect in Washington, petitioner was given an indeterminate sentence to be administered by the Indeterminate Sentence Review Board (the "ISRB"), not to exceed 20 years imprisonment. (*Id.*)

While on parole from the robbery conviction in 1988, petitioner was convicted of several other crimes. (Doc. #10, Ex. 14). As a result, the ISRB revoked petitioner's parole and extended the minimum prison term on his robbery conviction to December, 1994. (*Id.*, Ex. 16). In 1992, 09 however, the Board reconsidered and "paroled" petitioner so he could start serving the sentences for the other crimes he had committed. (*Id.*, Ex. 18). Petitioner remains currently incarcerated on these other convictions.

Petitioner has filed two personal restraint petitions in state court. (*Id.*, Exhibits 25 and 31). The state court denied both petitions. (Id., Exhibits 34 and 39). In addition, petitioner has filed two federal habeas petitions in the Western District of Washington. See Evans v. DuCharme, Case No. C97-5479-RJB; Evans v. DuCharme, Case No. C97-5483-FDB. The district court denied both habeas petitions. (Doc. #17 in Case No. C97-5479-RJB; Doc. #18 in Case No. C97-5483-FDB).

On October 20, 2005, petitioner filed the instant petition under 28 U.S.C. § 2254. (Doc. #1). On January 12, 2005, respondent filed a motion to dismiss the petition, chiefly on the ground that it was untimely. (Doc. #10). Petitioner filed a response on February 3, 2006, which included exhibits that revealed the existence of one of his prior federal habeas petitions. (Doc. #11). Concerned that the present habeas petition was therefore successive and the Court lacked

REPORT AND RECOMMENDATION

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jurisdiction to consider it, the Court directed petitioner to show cause why the petition should not be transferred to the Ninth Circuit as a successive petition. (Doc. #12) Petitioner filed a response to the Order to Show Cause (Doc. #14) and respondent has filed a reply (Doc. #16). This matter is now ready for review.

DISCUSSION

In his § 2254 motion, petitioner raises three grounds for relief. (Doc. #1 at 5-7). In essence, petitioner challenges various actions taken by the ISRB in extending his sentence. The precise dates of these actions are unclear, but it is clear that the ISRB's power over petitioner ended when his maximum 20-year sentence expired in December, 1994. (Doc. #10, Ex. 23). Therefore, the actions of the ISRB that petitioner complains of had to take place by 1994, at the latest.

Respondent argues that the Court need not address the merits of the petition because it is barred on several procedural grounds. (Doc. #10). In addition, respondent argues that the petition is successive and should be dismissed or transferred to the Ninth Circuit. (Doc. #16). As explained below, the Court agrees that the petition is successive and consequently, the Court need not address either the merits of the petition nor the alternative procedural grounds raised by respondent in her motion to dismiss.

Whether the Current Petition is Successive

By statute, this court is without jurisdiction to consider a second or successive habeas petition until the Ninth Circuit Court of Appeals has authorized its filing. *See* 28 U.S.C. § 2244(b)(3)(A); Circuit Rule 22-3. Title 28 U.S.C. § 2244(b)(3)(A) provides thabefore a second or successive habeas petition is filed in the district court, "the applicant shall move in the

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appropriate court of appeals for an order authorizing the district court to consider the application." Section 2244(b)(3)(A) thus creates a "gatekeeping" mechanism at the appellate court for the consideration of second or successive applications in the district courts. *See Felker v. Turpin*, 518 U.S. 651, 657 (1996). Specifically, it "transfers from the district court to the court of appeals a screening function which would previously have been performed by the district court..." Id. at 664. Permission may be obtained only by filing, with the appropriate appellate court, a motion for authorization to file a successive habeas petition with the district court. The court of appeals may authorize the filing of a second or successive application for habeas relief only if it determines the application makes a prima facie showing that the application satisfies the requirements set forth in 28 U.S.C. § 2244(b)(2).

Thus, the question here boils down to whether the current petition is a successive petition. "Generally, a new petition is 'second or successive' if it raises claims that were or could have been adjudicated on their merits in an earlier petition." Cooper v. Calderon, 274 F.3d 1270, 1273 (9th Cir. 2001)(emphasis added). Respondent apparently concedes that the claims raised here have not previously been adjudicated. (Doc. #16 at 5). However, respondent argues, and the Court agrees, that the claims could have been adjudicated earlier. As mentioned, petitioner's claims arose by the end of 1994, at the latest, when the ISRB's jurisdiction over petitioner ended. Petitioner offers no reason why he could not have challenged actions by the ISRB when he brought either of his earlier two habeas petitions in 1997, particularly the second petition, which challenged actions taken by the ISRB. (Doc. #18, Ex. 7 at 3). Accordingly, the current petition should be considered successive.

In his response to the Court's Order to Show Cause, petitioner addresses only one of his

Case 2:05-cv-01770-MJP Document 20 Filed 06/02/06 Page 5 of 5

two prior habeas petitions, Evans v. DuCharme, Case No. C97-5483-FDB. He argues that the district court's dismissal of that petition was "without prejudice" and therefore, does not bar the filing of a subsequent petition. See, e.g., Stewart v. Martinez-Villareal, 523 U.S. 637, 644-45 04 (1998). However, contrary to petitioner's assertion, the dismissal in his prior case was prejudice. (Doc. #18, Ex. 8). Accordingly, petitioner does not show that the instant petition is not successive and should not be transferred to the Ninth Circuit.

CONCLUSION

For the foregoing reasons, petitioner's petition under 28 U.S.C. § 2254 should be considered successive and transferred to the Ninth Circuit pursuant to 28 U.S.C. § 1631 and Circuit Rule 22-3(a). A proposed Order is attached.

DATED this 2nd day of June, 2006.

United States Magistrate Judge

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¹ Although respondent argues that the instant petition should be dismissed instead of transferred to the Ninth Circuit, dismissal of a successive petition is reserved, by statute, for situations where the successive petition presents a claim that the was previously presented. See 28 U.S.C. § 2244(b)(1). Here, as noted, respondent appears to concede that the instant claims were not presented in a previous petition.